

Decisions of Interest

MAY 1, 2023

CRIMINAL

FIRST DEPARTMENT

People v Donshik | April 27, 2023

SORA | UPWARD DEPARTURE NOT WARRANTED | MODIFIED

The defendant appealed from a Bronx County Supreme Court order adjudicating him a level two sex offender. The First Department modified by reducing to a level one. The record did not support an upward departure. The court should not have relied on the number of images possessed or the length of time the defendant had been collecting/viewing child porn. The original source of the allegation that the defendant had admitted to possessing over 100 images was unknown, and the court's conclusion that the defendant was active on a child porn website for a year and a half was not supported by the record. The balance of the record did not support an upward departure; the defendant immediately accepted responsibility and sought treatment, and there were no indicators that he had a propensity to sexually abuse children. John E. Finnegan represented the appellant.

[People v Donshik \(2023 NY Slip Op 02186\)](#)

People v Davenport | April 25, 2023

PCP PSYCHOSIS | NOT MENTAL DISEASE/DEFECT | AFFIRMED

The defendant appealed from a New York County Supreme Court judgment convicting him of 1st degree manslaughter after a bench trial. The First Department affirmed. The court correctly declined to consider the affirmative defense of lack of criminal responsibility by reason of mental disease or defect (see Penal Law § 40.15). It was undisputed that, at the time of the crime, the defendant suffered from PCP-induced psychosis and lacked substantial capacity to appreciate the wrongfulness of his conduct. But his temporary mental state was the result of voluntary use of an illegal substance, not a mental disease or defect. Inclusion of PCP-induced psychosis in the DSM, while relevant, was not dispositive.

[People v Davenport \(2023 NY Slip Op 02086\)](#)

SECOND DEPARTMENT

People v Weng | April 26, 2023

LEGAL SUFFICIENCY | DANGEROUS INSTRUMENT | MODIFIED

The defendant appealed from a Kings County Supreme Court judgment convicting her of 1st degree assault, 2nd degree assault (two counts), reckless assault of a child, 3rd degree assault, 4th degree CPW, and EWOC. The Second Department modified by vacating the

convictions for one count of 2nd degree assault, 4th degree CPW, and 3rd degree assault, and dismissing those counts. The trial evidence was not legally sufficient to establish that the bamboo stick with which the defendant struck her two-year-old child—which was not produced at trial—constituted a “dangerous instrument” that is “readily capable of causing death or other serious physical injury.” Appellate Advocates (Alice R. B. Cullina of counsel) represented the appellant.

[People v Weng \(2023 NY Slip Op 02134\)](#)

People v Augustin-Miranda | April 26, 2023

ORDER OF PROTECTION | DEFINITE EXPIRATION DATE REQUIRED

The defendant appealed from a Westchester County Court judgment convicting him of 1st degree course of sexual conduct against a child. The appeal brought up for review the order of protection (OOP) issued at sentencing. The Second Department affirmed the conviction, vacated the expiration provision of the OOP, and remitted for a determination of the duration of the OOP. County Court set the duration of the OOP until a date certain, “less the defendant’s jail time credit, which [was] to be computed by the applicable department of correction.” But the trial court must set a definite expiration date for the OOP (see CPL 530.13 [4], [5] [“An order of protection issued under this section shall plainly state the date that such order expires.”]).

[People v Augustin-Miranda \(2023 NY Slip Op 02131\)](#)

THIRD DEPARTMENT

People v Watts | April 27, 2023

SWORN JUROR REPLACED | DEFICIENT INQUIRY | REVERSED

The defendant appealed from a Chemung County Court judgment convicting him of 2nd degree CPW after a jury trial. The Third Department reversed and remitted for a new trial. County Court erred in dismissing a juror without conducting a reasonably thorough inquiry. The juror, after being selected and sworn in but before jury selection concluded, “needed to go home due to some health issues.” She agreed to return at 9:00 a.m. the next day. When she had not returned by 9:28 a.m. the next day, the court replaced her with the first alternate. The defendant objected. The court had received no notification from the juror and failed to conduct any inquiry into her absence. Without “a reasonably thorough inquiry” it was impermissible to presume that the juror was unavailable for continued service (see CPL 270.35 [2]). Paul J. Connolly represented the appellant.

[People v Watts \(2023 NY Slip Op 02144\)](#)

FOURTH DEPARTMENT

People v Alcaarez-Ubiles | April 28, 2023

MERE PRESENCE | NOT CONSTRUCTIVE POSSESSION

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree kidnapping, 1st degree criminal use of a firearm, 3rd degree CPW, and 4th degree CPW after a jury trial. The Fourth Department reversed the three weapon-related convictions and otherwise affirmed. Those convictions were based on the defendant’s constructive possession of a rifle that was found in the house where the kidnapping occurred. The evidence proved only that the defendant was present in the house where

the gun was located, which was insufficient to establish constructive possession. The Abbatoy Law Firm, PLLC (David M. Abbatoy, Jr., of counsel) represented the appellant. [People v Alcaarez-Ubiles \(2023 NY Slip Op 02226\)](#)

People v Barron | April 28, 2023

IAC | YOUTHFUL OFFENDER PROCEEDING

The defendant appealed from a Monroe County Court judgment convicting him of 1st degree manslaughter based on his guilty plea. The Fourth Department held the appeal in abeyance and remitted. The appeal had been previously held and remitted for County Court to determine whether the defendant should be granted youthful offender status (see 206 AD3d 1687 [4th Dept 2022]). On that remittal, County Court declined to adjudicate the defendant a youthful offender. However, the defendant did not receive meaningful representation because defense counsel was not sufficiently familiar with the case and the defendant's background. The Monroe County Public Defender (Shirley A. Gorman, of counsel) represented the appellant.

[People v Barron \(2023 NY Slip Op 02217\)](#)

People v Woodard | April 28, 2023

CPL 330.30 | DELAYED HEARING | DENIAL AFFIRMED

The defendant appealed from a 2017 Monroe County Supreme Court judgment convicting him of 2nd degree conspiracy, 3rd degree CSCS, and 3rd degree CPCS after a jury trial. The Fourth Department affirmed. The appeal had been previously held and remitted for Supreme Court to hold a hearing on the defendant's CPL 330.30 motion to set aside the verdict (see 199 AD3d 1377 [4th Dept 2021]). The motion included sworn affidavits of two jurors stating that other jurors held undisclosed racial biases that may have affected the verdict. One juror had sworn that a racial slur was uttered during deliberations. But at the hearing, held many years afterwards, all twelve jurors testified that they did not hear any racial slurs and most did not recall any discussion of race during deliberations. Based on the hearing testimony, Supreme Court's denial of the motion was not an abuse of discretion.

[People v Woodard \(2023 NY Slip Op 02207\)](#)

TRIAL COURTS

Matter of Legal Aid Socy. v N.Y. City Police Dept. | 2023 WL 3021949

FOIL | NYPD DISCIPLINARY RECORDS | GRANTED

New York County Supreme Court granted the petitioner's Article 78 petition challenging the denial of its FOIL request for documents relating to substantiated allegations of misconduct against NYPD officers. The respondent failed to turn over any documents, despite the petitioner's several good faith attempts to narrow the scope of the request. The respondent primarily relied on the personal privacy exemption under Public Officers Law § 87 (2) (b), notwithstanding the repeal of Civil Rights Law § 50-a and enactment of Public Officers Law § 86 (6) (a) (requiring presumptive disclosure of law enforcement disciplinary records). That the respondent's "own databases and software programs [are] slow, outdated, and overly complicated is not a valid excuse for claiming overburden" and there is "a clear and vital public interest" in the information sought.

[Matter of Legal Aid Socy. v N.Y. City Police Dept. \(2023 NY Slip Op 31283\[U\]\)](#)

People v McGee | 2023 WL 3085320

DISCOVERY | DUE DILIGENCE

The People requested a good faith extension of their time to provide discovery to the defense pursuant to CPL 245.70 (2). The defendant cross-moved, challenged the validity of the People's SOR, and sought dismissal of the charges pursuant to CPL 30.30. Kings County Criminal Court granted the People's motion and denied the defendant's motion. The People demonstrated due diligence in obtaining outstanding discovery based on annexed emails detailing their efforts. The People's failure to begin efforts to obtain discovery until seventy-two days post-arraignment did not render their COC invalid or their SOR illusory.

[People v McGee \(2023 Slip Op 50380\[U\]\)](#)

People v Seymour | 2023 WL 3088044

MISSING DISCOVERY | MUST NOTIFY PROSECUTOR

The defendant challenged the validity of the People's SOR and moved for dismissal of the charges against him pursuant to CPL 30.30. Suffolk County District Court denied the motion. The defendant did not notify the People of the deficiencies in their COC prior to filing his motion, in violation of CPL 245.50 (4) (b) and CPL 245.35 (1). Further, the motion was filed seventy-two days after the COC/SOR were filed, which was not "as soon as practicable."

[People v Seymour \(2023 Slip Op 23120\)](#).

FAMILY

SECOND DEPARTMENT

Matter of Cook v Perez | April 26, 2023

LEGAL CUSTODY | MEDICAL DECISION-MAKING | MODIFIED

The mother appealed from a Nassau County Family Court order that, among other things, awarded the father final decision-making authority over the children's medical issues. The Second Department modified by vacating that provision. The father did not demonstrate a change in circumstances warranting such modification. His complaints focused on the children having missed school and summer camp in 2019 because they were not immunized. But the Court had already addressed this situation, resulting in its December 2019 order directing the mother to have the children immunized within approximately three months. The father filed the instant modification petition just two months later, notwithstanding the mother's compliance with the court's directive to have the children immunized. Thomas R. Villecco represented the mother.

[Matter of Cook v Perez \(2023 NY Slip Op 02122\)](#)

Matter of Sealy v Peart | April 26, 2023

OOP | FINDINGS OF FACT REQUIRED | REMITTED

The appellant appealed from two Queens County Family Court orders of protection (OOP): (1) directing her to stay away from the respondent for one year; and (2) directing the respondent to stay away from her for one year, which implicitly found a lack of aggravating circumstances. The Second Department held the appeal in abeyance and

remitted. Family Court must set forth the factual findings essential to its decision. While remittal is not necessary where the record is sufficient for independent appellate review, Family Court set forth no findings regarding the parties' credibility or essential facts, and the parties presented sharply conflicting allegations.

[Matter of Sealy v Peart \(2023 NY Slip Op 02128\)](#)

FOURTH DEPARTMENT

Crofoot v Crofoot | April 28, 2023

DIVORCE | CUSTODY MODIFIED

The mother and the AFC appealed from a Monroe County Supreme Court judgment that, among other things, granted the parents joint legal custody and the father primary physical custody. The Fourth Department modified the judgment, awarded sole legal and physical custody to the mother, and granted the father visitation. The obvious hostility between the parents rendered joint custody inappropriate. Supreme Court failed to give adequate weight to the father's extensive history of domestic violence, continued minimization of his actions, denial of his mental illness, and restriction of the mother's communication with the children when they were with him. The court gave undue weight to the mother's decision to relocate and insufficient weight to the mother's participation in counseling, compliance with her prescribed medication, and willingness to foster the children's relationships with the father. Kaman Berlove, LLP (Gary Muldoon, of counsel) represented the mother.

[Crofoot v Crofoot \(2023 NY Slip Op 02205\)](#)

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